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September 8, 2004

VIA FEDEX AND ELECTRONIC MAIL

Mary Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: D.T.E. 03-60; Response to Verizon's September 1 Letter

Dear Ms. Cottrell:

Verizon's September 1 letter in this docket is as perplexing as it is stubborn. Verizon remarkably stands by its contention that "virtually every state commission to consider this issue" has ruled that *USTA II* eliminates any obligation of Verizon MA to provide access to the network elements that were vacated by *USTA II*. Challenged to identify these supposed state orders, Verizon has provided only two — which in any event hardly constitute "virtually every state to have considered this issue" — and neither support its conclusion.

The Virginia order on which Verizon relies explicitly disavows the conclusion Verizon asserts: "We do not in this Order reach the arguments of the parties regarding the effects of *USTA II* and the [*Triennial Review Order*] on the interconnection agreements and unbundling obligations."¹ This order therefore certainly does not conclude that *USTA II* eliminates any and all Verizon obligation to provide access to network elements; instead it reserves that determination for future proceedings.²

Verizon next suggests that the Oregon PUC demanded an *FCC* determination of impairment as a prerequisite to a state unbundling order. However, the PUC's order clearly explains that an impairment

¹ *Petition of Competitive Carrier Coalition for an Expedited Order that Verizon Virginia Inc. and Verizon South Inc. Remain Required to Provision Unbundled Network Elements on Existing Rates and Terms Pending the Effective Date of Amendments to the Parties' Interconnection Agreements*, Case No. PUC-2004-00073, Order at 6, fn. 2 (Virginia S.C.C. July 19, 2004).

² It should be noted that the Virginia Commission declines to conduct Section 252 arbitrations. Thus, whereas in Massachusetts the Department would conduct its own impairment analysis in the absence of an effective FCC regulation, as it did with dark fiber, in Virginia that task would likely be deferred to the FCC. This distinction may have contributed to the commission's reference in dicta (cited by Verizon) to an FCC impairment determination.

finding could be made by the state commission if no effective FCC determination had been made.³ The DTE relied on exactly this model when in 1996 it ordered Verizon to unbundle dark fiber in the absence of an FCC impairment determination.⁴ Similarly, until the FCC completes its new remand proceeding, the Department could not approve any tariff amendment or arbitration award that would permit Verizon to eliminate UNEs without completing its own impairment analysis to fill the temporary gap in the FCC's regulations.⁵ In the meantime, the terms of the existing tariffs and contracts continue to apply.

The two state decisions relied upon by Verizon therefore do not support Verizon's attempt to equate its asserted right under its interconnection agreements to eliminate UNEs no longer required by "applicable law" with a right to eliminate UNEs vacated by *USTA II*. Verizon is effectively trying to rewrite the contracts to replace the words "applicable law" with the words "effective FCC regulations." No interconnection agreement gives Verizon the right to eliminate UNEs based upon a disputed and incorrect interpretation of "applicable law," and CLECs will have a right under the terms of their agreements to seek resolution of the resulting disputes from the Department. The CLECs therefore urge the Department to move forward with this proceeding to enable it to provide timely resolution of these disputes that would be needed to protect competition and consumers from undue disruption.

Respectfully submitted,



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Massachusetts, Inc.; segTEL, Inc.; and XO
Massachusetts, Inc.

cc: Paula Foley, Assistant General Counsel
Jesse Reyes, Esq., Hearing Officer
Michael Isenberg, Esq., Telecommunications Director
April Mulqueen, Esq., Asst. Telecommunications Director
DTE 03-60 Service List

³ *Application of Verizon Northwest, Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Delaware Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, Arb. No. 531, Order 04-369 at 8 (Oregon P.U.C. June 30, 2004).

⁴ See Petitioners' July 30, 2004 Comments at 2.

⁵ See *id.* at 2-3.